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Final Regulations on Practice Before IRS Added to Circular 230

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Issue Contents

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Final Regulations on Practice Before IRS Added to Circular 230

-by Neil E. Harl*

Final regulations revising the rules governing practice before the Internal Revenue Service in Circular 230 were issued on September 26, 2007.[1] The final regulations reflect amendments made by the American Jobs Creation Act of 2004.[2] The legislation signed on May 25, 2007, the Small Business and Work Opportunity Tax Act of 2007,[3] which amended several provisions of the Internal Revenue Code to extend the application of the income tax return preparer penalties to all tax return preparers, alter the standards of conduct that must be met to avoid imposition of penalties for preparing a return that reflects an understatement of tax liabilities and increase the applicable penalties, is not reflected in the final regulations but a segment of the relevant regulations is reserved for those regulations[4] and a notice of proposed rule making in that area has been published.[5] The final regulations issued on September 26, 2007 are effective on that date[6] except for the regulations on contingent fees.[7]

The final regulations mirror fairly closely the proposed regulations[8] as amended in 2006[9] but with some significant changes as noted below.

Practice before the Internal Revenue Service

The final regulations specify that "practice before the Internal Revenue Service comprehends all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service."[10] The final regulations provide that "practice" includes ". . . rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion, and representing a client at conferences, hearings and meetings."[11] The final regulations rejected the argument that the rendition of tax advice is not, in and of itself, an act constituting practice before the IRS.[12]

Who may practice before IRS

The final regulations clarify that an attorney or CPA is not required to file a Form 2848, "Power of Attorney and Declaration of Representative," before rendering written advice although that is deemed "practice before the IRS."[13] Any practice before the IRS other than the rendering of written advice continues to require an attorney or CPA to file a Form 2848 with the Internal Revenue Service.[14]

Limited practice before the IRS

The final regulations do not adopt the provisions governing "limited practice" before the IRS as had been proposed.[15] As a result, the authorization[16] which allows an individual,

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who was not otherwise a practitioner, to represent a taxpayer during an examination if that individual prepared the return for the taxable year under examination is retained.[17] An unenrolled return preparer who prepared the return for the year under examination may continue to negotiate with IRS on behalf of that taxpayer during an examination or bind that taxpayer before any other office of IRS (including Collection or Appeals), can execute closing agreements, request claims for refund or waivers or otherwise represent taxpayers before the IRS.[18]

The final regulations do state that the IRS, after notice and an opportunity for a conference, may deny eligibility to engage in limited practice before IRS to any individual who has engaged in conduct that would justify a sanction.[19]

Practice by former government employees, their partners and associates

The final regulations modify the current regulations to prohibit, for two years after government employment has ended, former IRS employees from appearing before, or communicating with intent to influence, an employee of the Department of the Treasury, with respect to a rule in which they were involved in developing within a year prior to termination of government employment.[20] The final regulations also specify that no former government employee who personally and substantially participated in a particular matter involving specific parties can represent or "knowingly assist" any person who is or was a party to that particular matter.[21] Moreover, no former government employee who within a one year period prior to termination of government service had official responsibility for a matter involving specific parties, may within two years after the end of government employment represent any person who is or was a party to that particular matter.[22]

Contingent fees

Under some pressure from commentators, the Department of the Treasury eased back on the proposed rules for contingent fees with the final regulations permitting a practitioner to charge a contingent fee for services rendered in connection with an IRS examination of, or challenge to – (1) an original tax return or (2) an amended return or claim for refund or credit where the amended return or claim for refund or credit is filed within 120 days of the taxpayer receiving a written notice of examination or a written challenge to the original tax return.[23] The final regulations also permit the use of contingent fees for interest and penalty reviews and, therefore, a contingent fee may be charged for services rendered in connection with a claim for refund or credit filed in connection with the determination of statutory interest or penalties assessed by IRS.[24] Also, the final regulations allow a practitioner to charge a contingent fee for services rendered in connection with any judicial proceeding arising under the Internal Revenue Code.[25]

The final regulations on contingent fees only apply to fee arrangements entered into after March 26, 2008.[26]

Conflicting interests

With respect to the issue of conflict of interest, the final regulations require a practitioner to obtain consent to the representation from each affected client in writing in order to represent the conflicting interests.[27] The Treasury explanation states that the American Bar Association model rule 1.7, which permits affected clients to provide informed consent verbally if the consent is contemporaneously documented by the practitioner in writing (a verbal consent followed by a confirmatory letter authored by the practitioner) will not satisfy the requirements of the final regulations unless the confirmatory letter is countersigned by the client.[28] The final regulations do provide that the confirmation can be made within a reasonable time but in no event later than 30 days.[29]

Incompetence and disreputable conduct

The final regulations are modified to provide that failure to sign a return is not disreputable conduct if the failure is due to reasonable cause and not due to willful neglect.[30]

Discovery, hearings and publicity of proceedings

The final regulations adopt the proposed changes on the use of discovery in disciplinary proceedings,[31] procedural protections such as the right to cross examine witnesses[32] and provisions regarding publicity of disciplinary proceedings with disclosure delayed until after the decision becomes final.[33]

Expedited suspension

The final regulations expand the authority of the IRS Office of Professional Responsibility to institute expedited suspension proceedings against practitioners who advance frivolous or obstructionist positions after a sanction by a court of competent jurisdiction.[34]

Decision of Administrative Law Judge

The final regulations do not adopt the proposed rules for a more streamlined process for deciding appeals of the decisions of Administrative Law Judges; thus, the current rules remain in effect.[35] The final rules do specify that the Secretary of the Treasury (or delegate) should make the agency decision within 180 days after receipt the appeal.[36]

FOOTNOTES

[1] T.D. 9359, 2007-2 C.B. 931; Treas. Reg. §§ 1.01 through 10.90. See generally, Harl, *Farm Income Tax Manual* § 205 (2006 ed.)

[2] Pub. L. No. 108-357, 118 Stat. 1418 (2004).

[3] Pub. L. No. 110-28, 121 Stat. 190 (2007).

[4] Treas. Reg. § 10.34(a) and (e).

[5] See T.D. 9359, 2007-2 C.B. 931.

[6] *Id.*

[7] Treas. Reg. § 10.27(d).

[8] NPRM REG-122380-02.

[9] 71 Fed. Reg. 6421, Feb. 8, 2006.

[10] Treas. Reg. § 10.2(a)(4).

[11] *Id.*

[12] T.D. 9359, 2007-2 C.B. 931.

[13] Treas. Reg. § 10.3.

[14] *Id.*

[15] See Prop. Treas. Reg. § 10.7.

[16] Treas. Reg. § 10.7(c)(viii).

[17] See Treas. Reg. § 10.7(c).

[18] T.D. 9359, 2007-2 C.B. 931.

[19] Treas. Reg. § 10.50.

[20] Treas. Reg. § 10.25(b)(4).
[21] Treas. Reg. § 10.25(b)(2).
[22] Treas. Reg. § 10.25(b)(3).
[23] Treas. Reg. § 10.27(b)(2).
[24] Treas. Reg. § 10.27(b)(3).
[25] Treas. Reg. § 10.27(b)(4).
[26] Treas. Reg. § 10.27(d).
[27] Treas. Reg. § 10.29(b)(3).
[28] T.D. 9359, 2007-2 C.B. 931.
[29] Treas. Reg. § 10.29(b)(3).
[30] Treas. Reg. § 10.51(a)(14).
[31] Treas. Reg. § 10.71.
[32] Treas. Reg. § 10.72(b).
[33] Treas. Reg. § 10.72(d).
[34] Treas. Reg. § 10.82.
[35] Treas. Reg. §§ 10.77, 10.78.
[36] Treas. Reg. § 10.78(a).

CASES, REGULATIONS AND STATUTES

by Robert P. Achenbach, Jr

BANKRUPTCY

GENERAL

AUTOMATIC STAY. The debtor had filed a previous Chapter 12 case which was dismissed because the debtor did not qualify as a family farmer since the debtor had over $4 million in debt. The debtor filed for Chapter 11 and a creditor sought termination of the automatic stay 30 days after the filing of the petition as provided by Section 362(c)(3), added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, because the debtor had not filed the Chapter 11 case in good faith. The court held that the debtor had filed the Chapter 11 case in good faith, as demonstrated by the factors that the previous case was dismissed for lack of eligibility and the debtor did not file the second case in order to delay or frustrate a creditor's efforts to enforce its rights through foreclosure. ***In re* McKinnon, 2007 Bankr. LEXIS 3317 (Bankr. S.D. Ga. 2007)**.

FEDERAL AGRICULTURAL PROGRAMS

CROP INSURANCE. The FCIC has adopted as final regulations amending the common crop insurance regulations; northern potato crop insurance provisions, northern potato crop insurance quality endorsement, northern potato crop insurance processing quality endorsement, potato crop insurance certified seed endorsement, northern potato crop insurance storage coverage endorsement, and the central and southern potato crop insurance provisions to provide policy changes and clarify existing policy provisions to better meet the needs of the insureds, and to reduce vulnerability to fraud, waste and abuse. The changes are intended to apply for the 2008 and succeeding crop years. **72 Fed. Reg. 61273 (Oct. 30, 2007)**.

HORSES. Under current regulations, horses being transported to a slaughter facility are subject to requirements for transportation method; water, feed and rest requirements; and paperwork requirements. These regulations did not apply if the horses were first transported to an assembly point, feedlot or stockyard for further shipment to a slaughtering facility. In response to evidence that this exception is being abused to avoid the transportation requirements, the APHIS has issued proposed regulations which remove the exceptions for horses first transported to assembly points, feedlots and stockyards. Thus, horses being transported for eventual slaughter are covered by the transporting requirements during the entire trip to the slaughter facility, whether or not the horses are first transported to an assembly point, feedlot or stockyard. **72 Fed. Reg. 62798 (Nov. 7, 2007)**.

PERISHABLE AGRICULTURAL COMMODITIES ACT. The AMS has issued proposed regulations amending the rules of practice under the PACA to increase informal complaint filing fees and formal complaint handling fees. The proposed rules increase from $60 to $100 the fee for filing an informal complaint and would increase from $300 to $500 the fee for handling a formal complaint. **72 Fed. Reg. 61820 (Nov. 1, 2007)**.

FEDERAL ESTATE AND GIFT TAXATION

GENERATION SKIPPING TRANSFERS. Seven trusts were created prior to September 25, 1985. The beneficiaries of the trusts decided to merge the seven trusts into four trusts, with original trusts 1 and 2 merging into new trust 1, original trusts 3